

PUBLIC MEETING MINUTES

February 13, 2014

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:00 a.m.

Members Present

Anita I. Martinez, Chair
A. Eugene Huguenin, Member
Priscilla S. Winslow, Member
Eric R. Banks, Member

Staff Present

Suzanne Murphy, General Counsel (Excused)
Wendi Ross, Deputy General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Mary Ann Aguayo, Chief Administrative Officer
Loretta van der Pol, Division Chief, State Mediation & Conciliation Service

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the December 12, 2013, Public Meeting. She reported that the Board met in continuous closed session to deliberate the pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in December. Those were PERB Decision Nos. 2343-M, 2344-M, 2345-M, 2346-M, 2347-M, 2348-M, 2349-M, 2350-M, 2351-M, 2352-M and 2353, and Order Nos. Ad-405, Ad-406-M, and Ad-407-M. The following Request for Injunctive Relief (IR Request) was filed: No. 652 (*Service Employees International Union, Local 721 v. Coachella Valley Water District*), the request was denied. Chair Martinez announced that a document containing a listing of the aforementioned decisions was available at the meeting, and that the decisions were available on PERB's website.

Motion: Motion by Member Huguenin and seconded by Member Banks, to close the December 12, 2013, Public Meeting.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Chair Martinez adjourned the December 12, 2013 Public Meeting. She then opened and called to order the February 13, 2014 Public Meeting.

Minutes

Motion: Motion by Member Winslow and seconded by Member Banks, that the Board adopt the minutes for the November 14, 2013 and December 12, 2013, Public Meetings.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Comments From Public Participants

None.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

A. Division of Administration

Mary Ann Aguayo, Chief Administrative Officer, reported on matters in Administration stating her great fortune at having been an observer at PERB's last Public Meeting, and now hired and a participant. She reported as follows:

- i The Board's budget for the current fiscal year was on track with regard to expenditures. For the 2014-15 fiscal year, the Governor's budget was published on January 10 and remained primarily unchanged from the current fiscal year. The Department of Finance had approved a budget change proposal to transfer operating expense funds and support four new positions. This proposal would make its way through the legislative approval process; however, as a zero dollar proposal, the Board received approval to proceed with establishing and filling the four vacancies.
- i The Agency had two more vacancies in various stages of recruitment (in addition to the above-mentioned four positions).
- i The small facility expansion projects for PERB's Oakland and Glendale Regional Offices were moving forward. Based on recent updates it was estimated that the build-out timeframe for both offices would occur in approximately December 2014.
- i PERB's webpage was undergoing review for outdated contacts and links. The identified changes would be in place by the end of February.

Ms. Aguayo confirmed Member Winslow's question regarding the build-out timeframe for the Oakland Office as December 2014. Chair Martinez asked whether the delay was caused by the architect to which Ms. Aguayo stated her belief that it had to do with communications with the Department of General Services, not with the lessor.

B. Office of General Counsel

In General Counsel Suzanne Murphy's absence, Deputy General Counsel Wendi Ross reported that the monthly activity and litigation reports were distributed to the Board Offices for its review. From those reports Ms. Ross reported on the following information about activity since the Board's regular Public Meeting on December 12, 2013.

With regard to monthly activities for the months of December 2013 and January 2014, a total of 207 new cases were filed with the Office of the General Counsel (GC Office) (down by 146 over the prior two-month period, from 353 to 207—when the GC Office received a similar number of unfair practice charges (UPCs) from University of California (UC) agency fee objectors, but higher than the two-month period before, 199 to 207).

During the same two-month period, reported Ms. Ross, 154 case investigations were completed (down by 16 over the prior two-month period); respectable given that the GC Office continued to be busy with court litigation filings. This also followed a trend as UPC filings continued to grow, not counting the UC objector charges, the GC Office was on track for over 800 new UPCs this fiscal year. With that, Ms. Ross stated, the GC Office continued to lose ground on tackling the UPC backlog for the past year. In the former regard, the GC Office is on pace for approximately 240 litigation assignments for the current fiscal year (as compared to 146 for the last fiscal year and 139 the year prior). In the latter regard, as noted for the past several Board meetings, the GC Office's current investigation caseload for all cases continued to increase from a total of 468 at the end of June 2013; 491 at the end of September; 670 at the end of November; and 726 at the end of January (a 55 percent increase in the GC Office backlog for the current fiscal year). Also during December and January the GC Office saw another increase in the number of mediation requests, an increase in the number of factfinding requests, but a decrease in representation petitions. Still, that represented an increase in representation case activity over the past two months and the GC Office was on pace for 108 cases in the current fiscal year, compared to 99 and 77 for the past two fiscal years. Ms. Ross stated that there also appeared to be a related increase in the contentiousness and complexity of these representation matters.

As mentioned by the Chair, since the last Board meeting in December, the Board issued one determination as to a request for injunctive relief as follows:

- *Service Employees International Union, Local 721 v. Coachella Valley Water District*, IR Request No. 652. This request was denied on January 28, 2014.

In terms of court litigation relating to PERB since the regular Public Meeting in December, Ms. Ross stated that one new matter was filed by or against PERB as follows:

- *County of Riverside v. PERB*, California Court of Appeal, Fourth Appellate District, Division Two, Case No. E060047, Riverside Superior Court Case No. RIC1305661 [PERB Case No. SF-CE-1028-M]. The County filed a petition for writ of supersedeas on January 7, 2014, seeking to lift the stay effected by Code of Civil Procedure section 916(a), as to the trial court's mandatory injunction directing PERB to deny any pending or future "single subject" factfinding requests. The Court of Appeal summarily denied the County's writ of supersedeas on January 14, 2014, without waiting for PERB's opposition.

As to case determinations since the regular Public Meeting in December 2013, Ms. Ross reported that PERB had received two additional court rulings from the California courts.

- *Children of Promise Academy v. PERB*, California Court of Appeal, Second Appellate District, Division Three, Case No. B252854; PERB Decision No. Ad-402 [PERB Case No. LA-RR-1213-E], filed December 6, 2013, the writ petition was summarily denied by the Court of Appeal on December 12, 2013.
- *San Diego Housing Commission v. PERB*, San Diego Superior Court Case No. 37-2012-00087278. On January 31, 2014, the trial court granted the Commission's motion for summary judgment and ruled, much as did the Riverside Superior Court, that PERB's interpretation of AB 646 factfinding, to include disputes in bargaining over the effects of layoffs, and other "single-issue" mid-term bargaining, was clearly erroneous. Judgment has not yet been entered on the summary judgment order, and no injunction was currently in place. The Agency would likely appeal from the final judgment in that case, once entered.

C. Legislative/Rulemaking

Ms. Ross reported on legislation since the regular Public Meeting in December stating that the Board today would consider making permanent the emergency regulations to implement the provisions of the In-Home Supportive Services Employer-Employee Relations Act (IHSSEERA). IHSSEERA regulations were approved by the Board at a Special Meeting on November 14, 2013 and became effective on Friday, December 6, 2013 upon filing with the Secretary of State's Office. Ms. Ross stated that the goal was to have the final regulations regarding IHSSEERA approved by the Board with an effective date in early June 2014. She reported on other legislative activities since the last Board meeting as follows:

- AB 485 (Gomez)—This bill, which would be a significant update to IHSSEERA, passed out of the Senate Health Committee and moved on to Senate Appropriations. Per the Senate Health Committee's bill analysis last week, this bill as it stands would give the Statewide Authority responsibility as the employer for collective bargaining purposes in all 58 counties as of January 15, 2015, not just the pilot program in the eight big counties. This bill also effectively "de-links" the transition to State-level collective bargaining from every other aspect of the federal Coordinated Care Initiative (CCI), making the program permanent in California regardless of what happens with the CCI.

- AB 778 (Bocanegra)—This bill, a reincarnation of last year's AB 616, failed to get out of committee in time, and was now dead for this session.
- AB 1550 (Rendon)—This bill, a new bill the Agency was tracking, prohibits unilateral changes to the terms and conditions of employment under the Educational Employment Employer-Employee Relations Act (EERA).
- AB 1611 (Bonta)—This bill amended EERA to require school districts to give at least 15 working days' notice to a classified employee union of its intent to make a change to a matter within the scope of representation. As written, the bill applies only to classified employee negotiations, but there are no bill analyses as of yet.
- SB 423 (Huff)—This bill to ban transit strikes, was dead, but an identical bill, AB 1536 (Olsen), was introduced in the Assembly on January 21, 2014. It is tentatively scheduled to be heard on February 21, 2014.

With reference to Ms. Ross' report on litigation matters, Member Winslow asked what the GC Office considered a litigation assignment. There was discussion by the Board in this regard.

D. Division of Administrative Law

Chief ALJ Cloughesy reported on the activities of the Division of Administrative Law and stated that the administrative law judge (ALJ) report had been distributed to the Board for its review. Mr. Cloughesy stated that in all offices cases were currently being scheduled for formal hearing two months from the date of informal settlement conference. He stated that he was unaware of how long this trend would last, but expected cases set for formal hearing would eventually return to its usual timeframe, three months from the date of informal. As compared to the previous year, the number of days of formal hearing was approximately the same, but proposed decisions issued were down. He expected an increase in production with the hire of an eighth ALJ and noted another trend not seen in the prior fiscal year—cases settling just prior to formal hearing—that would assist in ALJ decision writing time. Mr. Cloughesy concluded, the ratio for exceptions to ALJ proposed decisions was 45 percent.

E. State Mediation and Conciliation Service

Ms. van der Pol reported that the State Mediation and Conciliation Service (SMCS) Division report was distributed to the Board noting that spreadsheets which provided greater detail regarding cases that opened and closed during the months of December and January had also been distributed. She reported that in December 2013, SMCS had 70 cases remaining active at the end of the month of which 13 were PERB impasses. There were 64 cases that were opened and 54 closed in that month. At the close of January 2014, SMCS had 117 active cases, 9 of which were PERB impasses, 65 cases were opened and 83 closed. With that, SMCS was trending up to its normal caseload, stated Ms. van der Pol. She speculated that school districts were instituting the new Local Control Funding Formula (LCFF) in the L-Cap processes, were not yet to the point where they required mediation for impasses and therefore SMCS was expecting a spike in the spring.

Regarding SMCS personnel matters, Ms. van der Pol reported that SMCS had two new mediators and was therefore fully staffed. Yu Yee Woo joined SMCS on January 1 and Thomas Ruiz on January 22. Ms. Woo came to SMCS as a full-time mediator after having worked with SMCS for two years part-time. Mr. Ruiz came to SMCS from the San Francisco Unified School District. Both Ms. Woo and Mr. Ruiz had extensive training and experience either because they had been exposed to or were involved in mediation.

Ms. van der Pol reported that SMCS staff had attended training on the new school funding formulas in Sacramento on January 7. Staff also had an overview of the Affordable Care Act and the LCFF budget process now in place for public schools which primarily focused on those areas that were going to prove problematic in collective bargaining over the next few years because of the trigger dates in both of those bodies of legislation.

SMCS had anticipated its case management system (MATS) would be fully up and running by the end of January but that project was slightly delayed due to a minor problem that had not been addressed in earlier discussions regarding features needed in the program. The division expected MATS to be fully operational in February or March. The division was currently working on the mass mailer which would announce all SMCS staff changes and provide updated contact information to all of the public agencies and unions in the State of California. SMCS expected to complete this project also by the end of March. The division also was to conduct an inter-agency agreement election which was not related to a labor management dispute but fell under the guidelines for the type of consent elections that SMCS could perform for a fee. This project was especially interesting, stated Ms. van der Pol, as it involved the printing of ballots, to count and supervise an election which involved a significant number of people who were visually impaired or blind.

Motion: Motion by Member Winslow and seconded by Member Banks that the Division of Administration, Office of the General Counsel, Legislative/Rulemaking, Division of Administrative Law, and SMCS reports be accepted and filed.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Old Business

Member Banks led the discussion on job descriptions for PERB division managers. At PERB's last Public Meeting in December 2013, the Board discussed job descriptions for PERB division managers which had not been revised for some time, stated Member Banks. At Member Huguenin's request the Board delayed adoption of the job descriptions to allow review by the division managers. With minor changes to the General Counsel and Chief Administrative Law Judge duty statements, the job descriptions were now resubmitted to the Board for consideration.

Member Huguenin provided additional information known to the Agency, but could be clarified for constituents. He stated that the Board itself had the function to administer all statutes within its jurisdiction. In that regard, the Board conducted public meetings, set policy for the Agency, and as a primary function, which consumed most of the Agency's time, was its adjudicative function. That function included the review of matters, either from the appeal of a Board agent's dismissal of an unfair practice charge or exceptions to an ALJ's proposed decision. In that endeavor, each PERB Board Member is advised by their individual legal counsel. At the Board Member's request, their legal counsel are appointed by the Governor and serve at the Board Member's pleasure. With respect to most other aspects of PERB Board Member functions relating to the Agency, particularly matters related to injunctive relief requests and Bagley-Keene responsibilities for open meetings, Members rely on its chief legal officer: the General Counsel, and the GC Office staff for advice. Member Huguenin wanted to make clear for constituents that with regard to their adjudicative functions, PERB Board Members did not consult with PERB's General Counsel, but relied on each of their individual Board legal counsel. Member Huguenin stressed the very sharp line drawn for the role of the General Counsel which was to advise PERB Board Members on various issues which did not include determinations made regarding their adjudicative functions. He stated that one of the changes made in the General Counsel duty statement was clarification of this fact.

Member Banks noted the importance of PERB division managers' review of the job descriptions, and thanked them for their input and patience with this process.

Motion: Motion by Member Huguenin and seconded by Member Banks to adopt the job descriptions/duty statements for PERB Division Managers (General Counsel, Chief Administrative Law Judge, Chief Administrative Officer and Division Chief, State Mediation and Conciliation Service).

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Chair Martinez echoed Members Huguenin's and Banks' comments regarding the participation of division managers in the review and drafts of the job descriptions. She confirmed their accuracy and noted the amount of time devoted to this project. She thanked all for their participation, and especially Members Banks and Huguenin for leading the review, revisions and discussions on this project.

Chair Martinez then stated that before the Board would consider the rulemaking package regarding IHSSEERA, there was an announcement. The date for PERB's next Public Meeting would be changed from April 10 to April 17. This was to allow PERB to file notice with the Office of Administrative Law (OAL) on February 18, instead of February 28, to start the 45-day comment period. The 45-day comment period would then end on April 14 and the Board would hold the public hearing on the IHSSEERA regulation package on April 17. Moving the Public Meeting to April 17 would allow OAL an extra week for review and also PERB would not have to schedule an additional Public Meeting stated Chair Martinez.

Chair Martinez stated that the Board would now consider for approval to submit the IHSSEERA rulemaking package to OAL to initiate the formal rulemaking process. This

rulemaking package concerned the enactment of Senate Bill 1036 as amended by Assembly Bill 1471 wherein PERB became responsible for the administration and enforcement of IHSSEERA. In order to address these responsibilities, PERB conducted an emergency rulemaking process which included participation from interested persons, public hearings, a written comment period and Board approval. The culmination of that process was PERB's transmission of the emergency regulation text directly to the Secretary of State for filing on December 6, 2013. Upon filing with the Secretary of State, the emergency regulations became effective. PERB was in the next stage of the regulations for IHSSEERA, stated Chair Martinez, and the Board would now consider PERB staff recommendations and if authorized by the Board, the rulemaking package, including Notice of Proposed Rulemaking, Proposed Text and Initial Statement of Reasons, would be forwarded to OAL for review and publication pursuant to the Administrative Procedures Act. In addition, the Notice of Proposed Rulemaking would be distributed by PERB to interested parties and posted on the PERB website. She asked the GC Office to give a presentation regarding this rulemaking package.

GC Office Regional Attorney Jonathan Levy confirmed the facts regarding the IHSSEERA rulemaking package just stated by Chair Martinez. He added that with the filing of the package on December 6, 2013, the emergency regulations became effective and triggered a 180-day timeline for PERB to make permanent the IHSSEERA regulations. Staff sought approval today to start this process which included the posting of a notice to commence the 45-day written comment period, as well as a public hearing on April 17. The text sought for approval for filing was the same text currently in effect.

GC Office Regional Attorney Kent Morizawa provided a brief update on IHSSEERA itself. He stated that most of the eight demonstration counties were on target to come under IHSSEERA's jurisdiction as of April 2014, and the remaining two would come under IHSSEERA's jurisdiction in July 2014. (On February 19, 2014, a representative from the California Department of Human Resources contacted PERB, via e-mail message, to clarify that, "the counties are currently scheduled to begin the transition into the [CCI] beginning April 2014, but will not complete that transition until 2015," and that, "Under IHSSEERA and the Welfare and Institutions Code section 12300.7, the Statewide Authority does not assume responsibility for the county until the completion of the transition, and notification by the Director of the Department of Health Care Services that the transition is completed.") It should be kept in mind, stated Mr. Morizawa, that AB 485, as earlier mentioned by GC Office Deputy General Counsel Wendi Ross, was slated to make IHSSEERA effective to all counties as of July 1, 2015, regardless of whether or not they were one of the eight demonstration counties. And also, AB 485 was intended to de-link IHSSEERA from the CCI. The CCI had the potential to be defunct, or if the Director of Department of Finance determines that the CCI would not generate enough savings, the CCI would become inoperative. If the CCI became inoperative, the IHSSEERA collective bargaining provisions, as currently written, would become inoperative as well. AB 485 removes all links so that even if the CCI were to become inoperative, IHSSEERA collective bargaining provisions would remain intact and the Statewide Authority would continue to have jurisdiction over IHSS providers in all 58 counties.

Member Banks wanted to know if the reason for the legislation was due to the concern that there would not be a significant cost savings for the CCI.

Mr. Morizawa stated he believed that there was currently a concern and that IHSS providers came under the jurisdiction of the Statewide Authority on what was called a county implementation date, which was the date at which dual eligible recipients were to be enrolled in the CCI. He stated that there had been a delay in that process. Initially that was to be completed as of March 1, 2013, but had been pushed back to April 2014. (As noted above, and in clarification hereto, the transition process was to begin on March 1, 2013, but has been pushed back to April 2014.) He further stated his belief that he was unaware of a concern regarding the CCI itself becoming inoperative, but possibly had more to do with the delay in IHSS providers actually coming under the Statewide Authority's jurisdiction.

Member Banks wanted to know the two counties that would come under IHSSEERA's jurisdiction at the later date. Mr. Morizawa corrected his earlier report stating that the three counties were: Los Angeles, Alameda and Santa Clara.

Member Huguenin thanked Mr. Levy, Mr. Morizawa and all others for their work on the IHSSEERA regulations.

Chair Martinez invited the public to address the Board regarding the staff proposal on the IHSSEERA rulemaking package to which there were none. She also thanked the GC Office for all of the work performed in what she called a "thorny piece of legislation" PERB would now have under its jurisdiction.

Motion: Motion by Member Huguenin and seconded by Member Banks to submit the proposed IHSSEERA rulemaking package to the Office of Administrative Law to initiate the formal rulemaking process.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

New Business

None.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through April 17, 2014, when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code,

sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member Huguenin and seconded by Member Winslow to recess the meeting to continuous closed session.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Respectfully submitted,

Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

Anita I. Martinez, Chair